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In the Supreme Court of the United States

OCTOBER TERM

No. A-293

RICHARD W. BOTHMAN, as Chief Probation Officer, Santa Clara County Superior Court, Juvenile Division; *ex rel,* PHILLIP B., a minor,

Petitioner,

vs.

WARREN B. and PATRICIA B.,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

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Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in the case of *"In re Phillip B.,* a person coming under the Juvenile Court Law," entered on May 8, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is attached hereto as Appendix A and is reported at 92 Cal.App. 3d 796; 156 Cal.Rptr. 48. The modification of the opinion upon denial of a petition for rehearing is attached hereto as Appendix B and is reported at 93 Cal.App.3d 1010(l). The notification by the Clerk of the California Supreme Court that a petition for hearing was denied is attached hereto as Appendix C and is not reported.

JURISDICTION

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, was filed on May 8, 1979. Upon denial of a petition for rehearing, that opinion was modified on June 7, 1979. A petition for hearing before the California Supreme Court was denied on July 19, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

I. Has a minor, in a proceeding to provide him life-saving cardiac surgery over his parents' objection, been denied the equal protection of California law, as guaranteed by the Fourteenth Amendment to the United States Constitution, where the Juvenile Court applied a higher standard of proof to the showing made on his behalf than our law requires?

II. Has a developmentally disabled child been accorded fundamental fairness and the requisite due process of law when the Juvenile Court, in proceedings to provide life-saving cardiac surgery over his parents' objections, improperly receives evidence on the quality of the life the minor will lead after surgery?

STATUTE INVOLVED

This petition concerns proceedings under California Welfare and Institutions Code section 300(b) which is set forth in Appendix D.

STATEMENT OF THE CASE

Richard W. Bothman, as Chief Probation Officer for the Santa Clara County Superior Court, Juvenile Division, filed a petition on February 17, 1978, alleging that Phillip B. came within the provisions of section 300(b) of the California Welfare and Institutions Code because he had not been provided with the necessities of life. The minor's parents contested the petition and a hearing was held on April 27, 1978. At the close of that hearing the juvenile court dismissed the petition and a notice of appeal was filed.

By opinion filed May 8, 1979, the Court of Appeal of the State of California for the First Appellate District, Division Four, affirmed the juvenile court order dismissing the petition. On petition for rehearing the opinion was modified on June 7, 1979, and rehearing denied. The petition for hearing was denied by the California Supreme Court on July 19, 1979.

This petition for certiorari is filed within 90 days of the California Supreme Court's denial of the petition for hearing. See Title 28, United States Code section 2101(c); Supreme Court Rule 22(3).

STATEMENT OF FACTS

The petition alleged that Phillip B. was a minor afflicted with Down's Syndrome who was also suffering from a congenital heart defect which greatly reduced his life expectancy. Although the defect could be remedied surgically,

permitting the minor to enjoy a normal life span, his parents refused to consent to the surgery.

Phillip was examined by Dr. Gathman, a pediatric cardiologist, in 1973 for an evaluation of his cardiac problem. He was diagnosed as having a ventricular septal defect, a hole between the two major pumping chambers of the heart, and elevated pulmonary artery pressure which is normally associated with a large septal defect.[1] At that time Dr. Gathman recommended cardiac catheterization to further define the anatomy and dynamics of Phillip's condition but his parents refused to consent to this procedure.

In 1977 Phillip was again referred to Dr. Gathman for an evaluation and a cardiac catheterization was performed. Dr. Gathman reviewed his findings with Phillip's parents and recommended surgical correction of the septal defect. Dr. Gathman does not recommend this surgery for severely retarded children, those with I.Q.'s less than 30, but only where there is a chance the child can function in a relatively controlled environment and have a reasonable life. The operation posed a three to five percent risk which is regarded as low for cardiac surgery. Because of the progressive nature of the damage to the blood vessels in the lungs, delay will increase the operative risk.[2] Dr. French, a member of the faculty at Stanford University Medical School who specializes in pediatric cardiology, examined Phillip on referral from Dr. Gathman. In his opinion his ventricular septal defect can be corrected with reasonable surgical risk.

1. Because of the size of the septal defect the blood pressure in both of Phillip's ventricles is approximately the same. Thus, high pressure blood is admitted into his lungs damaging the vessels therein causing a condition called "pulmonary vascular disease" which is a progressive condition that eventually will lead to an early death. As the blood vessels in the lungs are damaged the flow through them is restricted until eventually unoxygenated blood flows through the septal defect causing the victim to die from the lack of oxygenated blood. As the disease progresses the victim experiences shortness of breath and is ultimately limited to a bed-to-chair existence.

2. This progression is usually rapid during the teenage years and Phillip was thirteen last Tuesday.

Phillip's pulmonary vessels have already undergone some change from the elevated pulmonary artery pressure caused by his ventricular septal defect. If the defect is repaired these changes were expected to reverse; however, without the operation these changes will progress until they severely incapacitate Phillip. The prognosis, without surgery, is that he will begin to do less physically until he will be almost totally incapacitated; he will be very short of breath with any exertion and may even be short of breath at rest; he will suffer periods of feeling faint and may actually pass out; he will be subject to headaches, chest pains, and bleeding through the lungs.

Phillip presents a slightly greater surgical risk than the average case because he is a Down's Syndrome child and has already undergone some pulmonary vascular changes. Dr. French estimated his mortality risk as between five and ten percent. The risk of complications after the operation, such as infections or prolonged hospital stay, are also slightly higher because Phillip is a Down's child. Without the operation Phillip's life expectancy ranges between a few years to fifteen or twenty. His life expectancy if the operation is performed would be the same as an otherwise normal child of his age.

If Phillip did not suffer from Down's Syndrome, Dr. French would recommend the operation and could not remember a case of a Down's Syndrome child with a similar heart problem who had been denied the operation. He has recommended against this surgery only in cases where the children are so severely damaged intellectually, or their

central nervous system is so damaged, that they are virtually unable to function.

Without the operation Phillip's pulmonary vessels will ultimately become so damaged that the septal defect cannot be corrected without killing him. In the doctor's opinion complications from the surgery will probably increase over the next one or two years.

Phillip's teacher, Elizabeth Betten, testified that Phillip is able to write his name in manuscript, his motor-sensory manual skills and his visual perception are very good. He is able to dress himself completely, count through twelve and can identify the numbers through twelve when they are mixed up. He is able to work at one of the top levels in the motor-integration area for his age. Phillip remembers the names of people and can find his way to any room in his school by the name of the teacher.

Mrs. Denman, a school psychologist for Santa Clara County, interviewed Phillip. From her observations and his test scores she concluded that Phillip is a high-functionally mentally retarded child with an I.Q. between 30 and 50. The prognosis for his adult placement would be in a shelter workshop because of his fine motor skills and hand strength. He also has an excellent memory for recent occurrences.

Jean Haight is a program coordinator at Schnuhr's nursery home where Phillip has resided since 1972. Phillip helps with the cho. es at the nursery. He is responsible for his own area, makes his bed, dresses and feeds himself and helps clear the table. He helps the staff fold the laundry, put away groceries and feeds the cat. He belongs to a boy scout troup and spent weekends with a family outside the nursery.

Vickie Holt is the county probation officer assigned to investigate Phillip's case. She had a meeting with Phillip's parents in January of 1978 to discuss the surgical repair of Phillip's heart defect. The parents, who opposed the surgery, expressed their concern that if Phillip outlived them he would become a burden on other members of their family and would not be provided with adequate care.

Opposition Evidence

In opposition to the petition Phillip's parents testified and two exhibits were admitted; a letter from Dr. Hartzel and his report on Phillip's condition. In Dr. Hartzel's opinion Phillip can be expected to make some progress in learning but will always need to be under the care of a supervisor whether in a state hospital or sheltered boarding house. He concluded,

> "By his simple and innocent nature, he would be a natural victim to anyone in the community who might take advantage of him by his trust or by taking his money. It is difficult for these individuals to fit into modern suburban society and, in my experience, they are isolated and rejected.
>
> "I therefore feel that the Beckers are completely justified in refusing to have risky cardiac surgery done on Phillip with the goal of increasing his life expectancy of a life I consider devoid of those qualities which give it human dignity."

Realizing that at some point all Down's children must ultimately be institutionalized, the Beckers decided it was best to put Phillip in a residential care facility directly from the hospital where he was born. When Phillip was an infant they visited him quite regularly, and had to move him from one home when the environment there deterio-

rated; however, now that they are confident he is receiving good care they do not visit as often.

In 1973 the County Health Department advised them of Phillip's heart condition and recommended surgery. They declined feeling it was not in Phillip's best interest. When Dr. Gathman again suggested the operation in 1977, they considered the matter for several weeks but again decided not to consent to the operation. They reasoned that so long as they live they can see that Phillip is well cared; but, if he survives them, living to an old age, the institutions available would not provide adequate care. They are also concerned that because of Phillip's pleasant outgoing personality he will be victimized by overreaching people. Phillip's parents have concluded that it would be better not to extend his life by means of this operation.

At the conclusion of the hearing the juvenile court concluded:

"I don't think that very personal decisions and rights to make decisions and rights to raise one's children and rights to have one's values and I guess civil rights and liberties should be unduly infringed upon. And, it seems to me that if parents are doing everything that they can, and therefore, are in fact acting in the child's best interests, then its not for me or anybody else to decide that they can't do it.

"I think there is no way to sustain the petition unless we decide that they don't have that right, somebody else has the right to second guess them.

• • •

"And so, with that state of mind, it comes down to a burden of proof. And the court rules that there is no clear and convincing evidence to sustain this petition...."

REASONS FOR GRANTING THE WRIT

I. The Erroneous Application of Too High a Standard of Proof Denied Phillip the Equal Protection of the Law.

The juvenile court held that there was no "clear and convincing evidence" to support state intervention in the parental decision that Phillip should not have corrective heart surgery. On appeal it was argued that the proper standard of proof was the "preponderance of the evidence." The Court of Appeal for the State of California held that the juvenile court had applied the correct standard and affirmed its order dismissing the petition. Petitioner recognizes that the several states are free to adopt varying standards of proof in juvenile dependency proceedings. *Addington v. Texas,* .... U.S. ....; 99 S.Ct. 1804, 1812 (1979); however, the California Court of Appeal erroneously applied a higher standard of proof to the showing made on Phillip's behalf than California law requires. If this were merely a case correcting a California court's erroneous interpretation of our State's laws, this Court would not have jurisdiction. *In re Murchison,* 349 U.S. 133, 135 (1955). But, the California Court of Appeal's erroneous interpretation will deprive Phillip of his right to life which is protected by the Fourteenth Amendment of the United States Constitution. We therefore ask this Court to grant a writ of certiorari to review the opinion of the California Court of Appeal on the ground that its erroneous application of our state's standard of proof in juvenile dependency cases has denied Phillip the equal protection of the law. See *In re Murchison, supra* at 136; Compare *Barr v. Columbia,* 378 U.S. 146, 149 (1964); *NAACP v. Alabama,* 357 U.S. 449, 457-458 (1958); 28 USC section 1257(3).

Both before[3] and after[4] the decision of the California Court of Appeal in Phillip's case, California courts have consistently held that the standard of proof to be applied to a petition brought pursuant to California Welfare and Institutions Code section 300 is the "preponderance of the evidence,"[5] where that petition does not seek to terminate the parent-child relationship in favor of a third party.

In deciding that the juvenile court had applied the correct standard of proof to the showing made on Phillip's behalf, the California Court of Appeal relied on *In re Robert P.* (1976) 61 Cal.App.3d 310; 132 Cal.Rptr. 5. Janice P., Robert's mother, appealed from an order of the juvenile court "depriving her of the custody of her minor son." See *In re Robert P., supra,* 61 Cal.App.3d at 313; 132 Cal.Rptr. at 6. As noted in *Alsager v. District Court of Polk City, Iowa,* (S.D. Iowa, C.D. 1975) 406 F.Supp. 10, 25, the Fourteenth Amendment of the United States Constitution requires a standard of proof greater than mere preponderance of the evidence to terminate parental custody. The California Supreme Court, consistent with *Alsager,* has held that before a juvenile court may award custody to a nonparent a clear showing that such award is essential to avert harm to the child is required. A finding that such an award will promote the "best interest" or the "welfare" of the child will not suffice. *In re B. G.* (1974) 11 Cal.3d 679, 698-699; 114 Cal. Rptr. 444, 457-459.

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3. *In re Lisa D.* (1978) 81 Cal.App.3d 192; 146 Cal.Rptr. 178; *In re Christopher B.* (1978) 82 Cal.App.3d 608; 147 Cal.Rptr. 390.

4. *In re Nicole B.* (1979) 93 Cal.App.3d 874; 155 Cal.Rptr. 916.

5. California Welfare and Institutions Code section 355 provides in pertinent part: "At the hearing, the court shall first consider only the question whether the minor is a person described by section 300, and for this purpose, any matter of information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *proof by a preponderance of evidence,* legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by section 300." (Emphasis added).

The petition filed on Phillip's behalf did not seek to terminate his parents' custody.[6] All that the petition sought was an adjudication that Phillip was a dependent child of the juvenile court on the grounds that his parents' refusal to consent to corrective heart surgery deprived him of a "necessity of life." The contemplated disposition was an order from the juvenile court allowing the operation to be performed. There was no request that the juvenile court remove Phillip from the custody of his parents and award that custody to a third party. Where the parent-child relationship is neither temporarily nor permanently altered, the appropriate standard of proof in California has always been the preponderance of the evidence test.

> "Here, the trial court was simply talking about the standard of proof necessary to support the factual allegations of dependency under section 300 of the Welfare and Institutions Code which, under section 355 of the same code is 'proof by a preponderance of evidence, legally admissible in a trial of civil cases . . . .'
>
> • • •
>
> "Questions concerning a more astringent standard do not arise until a finding of dependency results in a disposition which severs the parent-child relationship either temporarily or permanently." *In re Lisa D.,* 81 Cal.App.3d at 196; 146 Cal.Rptr. at 180.
>
> "However, the dependency hearing may not always end in removing the child from the parents' custody, as shown by the case at hand. The court may simply retain jurisdiction to supervise the proper maintenance of the child's environment.
>
> "We are of the opinion that clear and convincing proof is required only when the final result is to sever the parent-child relationship and award custody to a nonparent.
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> • • •

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6. Since birth Phillip has rarely been in the physical custody—i.e., residing with—his parents.

"The facts of *In re Robert P.* are substantially the same as here, but implicit in that case is the fact that custody of the minor was removed from the parent to a foster home. (*Id.* at page 313, 315). With such an implication, Civil Code section 4600 would require the higher standard.

"We do not believe we are mandated by the constitutional rights of either parent or child to expand the existing statutory standard of proof, where the only action of the court is to declare the minor to be a dependent child, and to retain custody of the child in the parents.

"We therefore hold the proper standard of proof in Welfare and Institutions Code section 300 cases, where the child is not removed from parental custody, to be a preponderance of the evidence, as per section 355 of that code." *In re Christopher B., supra,* 82 Cal.App.3d at 617-618; 147 Cal.Rptr. at 395-396.

"In response to the mother's assertion concerning the proper standard of proof to be applied, we need only point out it is now well established in cases of this sort, where the parent is not deprived of custody in favor of a nonparent, the correct standard for both jurisdictional and dispositional purposes is proof by a preponderance of the evidence . . . ." *In re Nicole B., supra,* 93 Cal.App.3d at 882; 155 Cal.Rptr. at 920-921.

Wherefore, petitioners respectfully submit that the California Court of Appeal has erroneously applied the higher standard of proof required when the parent-child relationship is severed and thereby denied Phillip the equal protection of our laws.

This Court has had occasion to recently discuss the obverse standard of proof in *Addington v. Texas,* .... U.S. ....; 99 S.Ct. 1804 (1979). As the court noted therein, in cases involving individual rights the standard of proof reflects the value society places on individual liberty. *Addington v. Texas, supra,* 99 S.Ct. at 809. Petitioner submits that

there is no societal interest served by requiring a minor diagnosed as needing corrective heart surgery to bear a disproportionate share of the risk of error in proceedings to obtain medical care over his parents' objections. Compare *Addington v. Texas, supra,* 99 S.Ct. at 1808. The use of the higher standard of proof is particularly intolerable where the parents' objections are based not on their concern for the risks of the medical treatment, but on their opinion as to the quality of the life to be lived. The injury to Phillip from an erroneous determination by the juvenile court is an early death. All he asks is to share the risk of error in that determination equally with society. Compare *Addington v. Texas, supra,* 99 S.Ct. at 1810.

II. The Admission of "Quality of Life" Evidence in the Juvenile Court Proceedings Denied Phillip Due Process of Law.

Phillip's parents' refusal to consent to corrective surgery was based on their belief that it was not in Phillip's best interest to prolong his life when there was no hope of improving its quality. The juvenile court, impressed by the depth and sincerity of Phillip's parents' beliefs, adopted them when it opined that it was inappropriate for a court to second guess the parents. Consideration of quality of life are beyond the scope of matters which may properly be adjudicated in a court of law in this country. To decide whether Phillip is to have life-saving surgery based on the "quality" of his life or his degree of mental retardation creates a suspect classification under the Fourteenth Amendment. Compare *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1; *Burgdorf;* "A History of Unequal Treatment; Qualification of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause" 15 Santa Clara Lawyer 855.

> "The right to life, liberty and the pursuit of happiness is not reserved to the healthy, able-bodied children and adults. It applies with even more force and intensity to the helpless, the physically handicapped, the mentally defective and the most unfortunate of children such as those at Willowbrook." *In re D.* (1972) 70 Misc. 2d 953; 355 N.Y.S.2d 638, 651.

The juvenile court should not have considered the "quality" of Phillip's life in deciding whether consent for the surgery should be ordered. See *Horan;* "Euthanasia—Medical Treatment and the Mongoloid Child; Death as a Treatment of Choice?" 27 Baylor L.Rev. 76.

The Court of Appeal of the State of California found substantial evidence to support the decision of the juvenile court in the testimony that the risk of this operation is increased because Phillip suffers from Down's Syndrome. Since the parents' opposition rested primarily upon quality of life considerations, this is akin to affirming a criminal conviction where a coerced confession has been admitted because there is other evidence of guilt in the record. Both procedures are fundamentally unfair and violative of the due process clause of the Fourteenth Amendment. Compare *Jackson v. Denno* (1964) 378 U.S. 368; *Blackburn v. Alabama* (1960) 361 U.S. 199; and *Payne v. Arkansas* (1958) 356 U.S. 560.

The mentally retarded in California are entitled to detailed procedural safeguards before they may be deprived of their right to reproduce. *Guardianship of Tulley* (1978) 83 Cal.App.3d 698, 705, 146 Cal.Rptr. 266, 270-271. Petitioner respectfully submits that Phillip's life cannot be forfeit in a proceeding affording less protection. Due process requires that this matter be remanded to the juvenile court with directions that a new hearing be held where only evidence of the risks posed by the operation and its expected benefits is admitted.

CONCLUSION

Petitioner submits that since Phillip's life depended upon the outcome of the proceedings in the Juvenile Court, the burden of proof could not be weighed against him.

The Juvenile Court considered quality of life evidence in determining if life-saving medical treatment should be authorized for Phillip. Petitioner submits that, while physicians who must determine which cases should be treated and parents called upon to decide whether to consent to such treatment may consider such a concept, such evidence cannot be considered in a court of law functioning under our Constitution. The reception of such evidence in the Juvenile Court taints the proceedings in this case with unfairness; particularly here, where the parents' objections are based solely on quality of life considerations, and the Juvenile Court concluded it did not have the "right to second guess them."

Wherefore, Petitioner, on behalf of Phillip B., respectfully requests that this Court issue a writ of certiorari to review the decision of the California Court of Appeal, First Appellate District, Division Four in "*In re Phillip B.*", number 1/Civ. 44291 in the files of that Court.

DATED: October 16, 1979

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Appendix A

CERTIFIED FOR PUBLICATION

In The Court of Appeal of the State of California

FIRST APPELLATE DISTRICT, DIVISION FOUR

Filed 11-8-1976 Court of Appeal—First App. Dist. Clifford C. Porter, Clerk.

1 Civil No. 44291
(Sup. Ct. No. 66103)

IN RE PHILLIP B., a Person Coming Under the Juvenile Court Law
RICHARD W. BOTHMAN, etc., and

PHILLIP B.,
Plaintiffs and Appellants,

vs.

WARREN B., et al.,
Defendants and Respondents.

A petition was filed by the juvenile probation department in the juvenile court, alleging that Phillip B., a minor, came within the provision of Welfare and Institutions Code section 300, subdivision (b),[1] because he was not provided with the "necessities of life."

The petition requested that Phillip be declared a dependent child of the court for the special purpose of ensuring that he receive cardiac surgery for a congenital heart defect. Phillip's parents had refused to consent to the surgery. The juvenile court dismissed the petition. The appeal is from the order.

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1. All statutory references are to the Welfare and Institutions Code, unless otherwise stated.

Phillip is a 12-year-old boy suffering from Down's Syndrome.[2] Since birth, he has been institutionalized. Phillip suffers from a congenital heart defect—a ventricular septal defect[3] that results in elevated pulmonary blood pressure. Due to the defect, Phillip's heart must work three times harder than normal to supply blood to his body. When he overexerts, unoxygenated blood travels the wrong way through the septal hole reaching his circulation, rather than the lungs.

If the congenital heart defect is not corrected, damage to the lungs will increase to the point where his lungs will be unable to carry and oxygenate any blood. As a result, death follows. During the deterioration of the lungs, Phillip will suffer from a progressive loss of energy and vitality until he is forced to lead a bed-to-chair existence.

Phillip's heart condition has been known since 1973. At that time Dr. Gathman, a pediatric cardiologist, examined Phillip and recommended cardiac catheterization to further define the anatomy and dynamics of Phillip's condition. Phillip's parents refused.

In 1977, Dr. Gathman again recommended catheterization and this time Phillip's parents consented. The catheterization revealed the extensive nature of Phillip's septal defect, thus it was Dr. Gathman's recommendation that surgery be performed.

Dr. Gathman referred Phillip to a second pediatric cardiologist, Dr. William French of Stanford Medical Center.

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2. "Down's syndrome or mongolism is a chromosomal disorder producing mental retardation caused by the presence of 47 rather than 46 chromosomes in a patient's cells, and marked by a distinctively shaped head, neck, trunk, and abdomen." (Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan.L.Rev. 213, fn. 5.)

3. In other words, a hole between his right and left ventricles.

Dr. French estimates the surgical mortality rate to be five to ten percent, and notes that Down's Syndrome children face a higher than average risk of postoperative complications. Dr. French found that Phillip's pulmonary vessels have already undergone some change from high pulmonary artery pressure. Without the operation, Phillip will begin to function less physically until he will be severely incapacitated. Dr. French agrees with Dr. Gathman that Phillip will enjoy a significant expansion of his life span if his defect is surgically corrected. Without the surgery, Phillip may live at the outset 20 more years. Dr. French's opinion on the advisability of surgery was not asked.

I

It is fundamental that parental autonomy is institutionally protected. The United States Supreme Court has articulated the concept of personal liberty found in the Fourteenth Amendment as a right of privacy which extends to certain aspects of a family relationship. (United States v. Orito (1973) 413 U.S. 139, 142 [right of privacy includes right of marriage, procreation, motherhood, child rearing, and education]; Roe v. Wade (1973) 410 U.S. 113, 152-153 [right of privacy extends to child rearing and education]; Wisconsin v. Yoder (1972) 406 U.S. 205, 232 [parental right to determine child's religious upbringing]; Eisenstadt v. Baird (1972) 405 U.S. 438, 453 [right to obtain contraceptives]; Griswold v. Connecticut (1965) 381 U.S. 479, 485-486 [right to marital privacy]; Skinner v. Oklahoma (1942) 316 U.S. 535, 541 [right to marriage and procreation]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535 [liberty of parents to direct education of their children]; Meyer v. Nebraska (1923) 262 U.S. 390, 399 [liberty of parents to raise child].) "It is cardinal with us that the

custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (Prince v. Massachusetts (1944) 321 U.S. 158, 166.)

Inherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best. Legal judgments regarding the value of childrearing patterns should be kept to a minimum so long as the child is afforded the best available opportunity to fulfill his potential in society.

Parental autonomy, however, is not absolute. The state is the guardian of society's basic values. Under the doctrine of *parens patriae,* the state has a right, indeed, a duty to protect children. (See e.g., Prince v. Massachusetts, *supra,* 321 U.S. 158 at p. 166.) State officials may interfere in family matters to safeguard the child's health, educational development and emotional well-being.

One of the most basic values protected by the state is the sanctity of human life. (U.S. Const., 14th Amend., § 1.) Where parents fail to provide their children with adequate medical care, the state is justified to intervene. However, since the state should usually defer to the wishes of the parents, it has a serious burden of justification before abridging parental autonomy by substituting its judgment for that of the parents.

Several relevant factors must be taken into consideration before a state insists upon medical treatment rejected by the parents. The state should examine the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm; the evaluation for the treatment by the medical profession; the risks involved in medically treating the child; and the expressed preferences

of the child. Of course, the underlying consideration is the child's welfare and whether his best interests will be served by the medical treatment.

Section 300, subdivision (b), permits a court to adjudge a child under the age of 18 years a dependent of the court if the child is not provided with the "necessities of life."

The trial judge dismissed the petition on the ground that there was "no clear and convincing evidence to sustain this petition."

The rule is clear that the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will suppport the conclusion reached by the trier of fact. (See 6 Witkin, California Procedure (2d ed. 1971) Appeal, § 245, p. 4236.) The "clear and convincing evidence" standard of proof applies only to the trial court, and is not the standard for appellate review. (See Crail v. Blakely (1973) 8 Cal.3d 744, 750.)

Turning to the facts of this case, one expert witness testified that Phillip's case was more risky than the average for two reasons. One, he has pulmonary vascular changes and statistically this would make the operation more risky in that he would be subject to more complications than if he did not have these changes. Two, children with Down's Syndrome have more problems in the postoperative period. This witness put the mortality rate at five to ten percent, and the morbidity would be somewhat higher. When asked if he knew of a case in which this type of operation had been performed on a Down's Syndrome child, the witness replied that he did, but could not remember a case involving a child who had the degree of pulmonary vascular change that Phillip had. Another expert witness testified that one of the risks of surgery to correct a ventricular septal defect was

damage to the nerve that controls the heart beat as the nerve is in the same area as the defect. When this occurs a pacemaker would be required.

The trial judge, in announcing his decision, cited the inconclusiveness of the evidence to support the petition.

On reading the record we can see the trial court's attempt to balance the possible benefits to be gained from the operation against the risks involved. The court had before it a child suffering not only from a ventricular septal defect but also from Down's Syndrome, with its higher than average morbidity, and the presence of pulmonary vascular changes. In light of these facts, we cannot say as a matter of law that there was no substintial evidence to support the decision of the trial court.

II

In denying the petition the trial court ruled that there was no clear and convincing evidence to sustain the petition. The state contends the proper standard of proof is by a preponderance of the evidence and not by the clear and convincing test. The state asserts that only when a permanent severance of the parent-child relationship is ordered by the court must the clear and convincing standard of proof be applied. Since the petition did not seek permanent severance but only authorization for corrective heart surgery, the state contends the lower standard of proof should have been applied.

In the case of *In re Robert P.* (1976) 61 Cal.App.3d 310, 318, the court pointed out that a dependency hearing pursuant to section 600,[4] need not result in a permanent severance of the parent-child relationship. Section 366 (formerly § 729) requires subsequent hearings at periods not exceeding one year until such time as the court's jurisdiction over such minor is terminated. *In re Robert P.* held that even though the severance need not be permanent the standard of proof was "clear and convincing" and not a "preponderance of the evidence." The statement in *In re Christopher B.* (1978) 82 Cal.App.3d 608, cited by appellant, that clear and convincing proof is required only when the final result is to sever the parent-child relationship and award custody to a nonparent is dicta. The *Christopher* court did not remove the child from the parents' custody but simply retained jurisdiction to supervise proper maintenance of the child's environment. The "clear and convincing standard" was proper in this case.

4. Section 600 has been repealed and the subject matter is now included in section 300.

III

Section 353 requires that at the beginning of the hearing on a petition, "[t]he judge shall ascertain whether the minor and his parent or guardian or adult relative, as the case may be, has been informed of the right of the minor to be represented by counsel, and if not, the judge shall advise the minor and such person, if present, of the right to have counsel present and where applicable, of the right to appointed counsel."

Amicus Curiae contends the judge erred in failing to notify Phillip of his right to counsel, thus Phillip was not properly represented.

A minor has a statutory right to counsel. (§ 318.5.) If a minor is already represented by counsel, it is not crucial that a judge inform a minor of his right to counsel. "[I]f either the minor or his parents . . . appear without counsel, the judge shall advise the *unrepresented* party of his rights under this section." (§ 318.5, subd. (d); emphasis added.)

In the present case, the facts show that a deputy district attorney was representing Phillip at the hearing. He was

introduced to the judge as Phillip's attorney. The deputy district attorney proceeded to make an opening statement and continued to represent Phillip throughout the entire hearing.

The judge was under no statutory duty to inform Phillip of his right to counsel when it was evident to the court that Phillip was, in fact, represented by counsel.

The order dismissing the petition is affirmed.

CERTIFIED FOR PUBLICATION

.....

Caldecott, P. J.

We concur:

.....

Rattigan, J.

.....

Christian, J.

In re Phillip B.—1 Civil No. 44291

Trial Court:	Superior Court Santa Clara County
Trial Judge:	Hon. Eugene M. Premo
Attorneys for Plaintiffs/Appellants:	Evelle J. Younger Attorney General of the State of California Jack R. Winkler, Chief Assistant Attorney General Criminal Division Edward P. O'Brien, Assistant Attorney General Timothy A. Reardon, Deputy William D. Stein, Deputy 6000 State Building San Francisco, Ca. 94102
Attorneys for Defendants/Respondents:	LEONARD P. EDWARDS Attorney at Law 28 North First Street San Jose, Ca. 95113
Amicus Curiae on behalf of Plaintiffs/Appellants:	Robert A. Baines, Directing Attorney Santa Clara County Bar Assn. Law Foundation, Inc. P.O. Box 267 San Jose, Ca. 95103
Amicus Curiae on behalf of Defendants/Respondents:	S. L. Stagnitto, Attorney at Law 2000 West Hedding Street San Jose, Ca. 95128

Appendix B

[Civ. No. 44291, First Dist., Div. Four. June 7, 1979.]

In re PHILLIP B., a Person Coming Under the Juvenile Court Law. RICHARD W. BOTHMAN, as Chief Probation Officer, etc., et al., Plaintiffs and Appellants, v. Warren B. et al., Defendants and Respondents.

[Modification* of opinion (92 Cal.App.3d 796: — Cal.Reptr. —) on denial of petition for rehearing.]

THE COURT.—The opinion is modified on page 2, line 5 [92 Cal.App.3d 796, 800, advance report, lines 1 and 2] as follows: Strike the sentence "Since birth, he has been institutionalized" and insert the sentence "At birth his parents decided he should live in a residential care facility."

The petition for rehearing is denied.

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*This modification requires editorial changes in the first paragraph of the summary, page 796, and headnote (5a, 5b), page 798 of the advance report. In the bound volume report, the second sentence of the first paragraph of the summary will be changed to read "The boy, also suffering from Down's syndrome, had been in a residential care facility since birth." Headnote (5a, 5b), page 798, lines 10-11 will be changed to read "would have greater than average risk because the child suffered from Down's syndrome, which has ??".

[June 1979]

Appendix C

CLERK'S OFFICE, SUPREME COURT
4250 State Building

SAN FRANCISCO, CALIFORNIA 94102

JUL 19 1979

I have this day filed Order "Hearing denied"

In re: 1 Civ. *No.* 44291
In re Philip B., A Minor
Bothman, etc., et al.

vs.

Warren B., et al.

Respectfully,

G. E. BISHEL
Clerk

Appendix D

WELFARE AND INSTITUTIONS CODE

§ 300 Persons subject to jurisdiction

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control. No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability, including, but not limited to, a defect in the visual or auditory functions of his or her body, unless the court finds that the disability prevents the parent from exercising such care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

(c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.

(d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.